

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

Submitted on Briefs May 7, 2009

JAMES C. MCWHORTER

v.

ALLEN SELBY and CITY OF SPARTA

Appeal from the Chancery Court for White County

No. 9837 Ronald Thurman, Chancellor

No. M2008-01502-COA-R3-CV - Filed November 9, 2009

This appeal concerns the return of seized property. In the course of a criminal investigation, the respondents seized personal property from the petitioner. After a year passed with no forfeiture proceeding, the petitioner filed a petition for the return of his seized property, pursuant to Tennessee Code Annotated § 39-11-709. The respondents filed a motion to dismiss or for summary judgment, asserting that they no longer had possession of the property. The trial court granted the motion. The petitioner now appeals. We reverse and remand, finding that the petition was correctly filed in the county in which the property was seized, that it correctly named as the respondents the parties who seized the property, and that the respondents were not entitled to dismissal of the petition on the basis that the respondents had transferred possession of the property.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Reversed and Remanded

HOLLY M. KIRBY, J., delivered the opinion of the Court, in which ALAN E. HIGHERS, P.J., W.S., and J. STEVEN STAFFORD, J., joined.

Petitioner/Appellant James C. McWhorter, Nashville, Tennessee, pro se

Lynn Omohundro, Sparta, Tennessee, for the Respondents/Appellees Allen Selby and City of Sparta

OPINION

FACTS AND PROCEDURAL HISTORY

The facts in this appeal are not disputed. At all times pertinent to this appeal, Respondent/Appellee Allen Selby (“Selby”) was the Chief Investigator of the Police Department of Respondent/Appellee City of Sparta. On November 6, 2006, Selby seized a Rolex wrist watch, an Ice Tech wrist watch, and six credit cards from Petitioner/Appellant James C. McWhorter

(“McWhorter”), who was implicated in a criminal investigation into bad checks and fraudulent driver’s licenses. At the time, Selby provided McWhorter a “Notice of Seizure” form that informed him that the property had been seized in White County, Tennessee, on behalf of the Sparta Police Department. No forfeiture proceeding was initiated.

Almost a year later, on October 24, 2007, McWhorter filed a petition for return of property in the Chancery Court of White County, pursuant to Tennessee Code Annotated § 39-11-709(b), seeking the return of his watches and credit cards. McWhorter’s petition named Selby and the City of Sparta as the respondents (collectively “Respondents”).

On December 11, 2007, the Respondents filed a motion to dismiss for failure to state a claim or, in the alternative, for summary judgment. The basis of the motion was that the Respondents no longer had possession of the property at issue. In support of the motion, the Respondents filed affidavits by Selby, in which he stated that McWhorter’s watches were first released to the Tennessee Highway Patrol, and then in turn to the Metropolitan Nashville Police Department. Selby professed to have no information about the credit cards, but stated his belief that they were with the U. S. Attorney’s office in Nashville. After a hearing on May 16, 2008, the trial court entered a written order dated May 23, 2008, granting the Respondents’ motion. From this order, McWhorter now appeals.

ISSUES ON APPEAL AND STANDARD OF REVIEW

In his appeal, McWhorter raises the following related issues for our review:

- (1) whether the trial court erred when it dismissed the petition for return of seized property;
- (2) whether a petition for return of seized property should be filed in the chancery court of the county where the property was seized;
- (3) whether a petition for return of seized property should name the party who seized the property as the respondent; and
- (4) whether the party who seized the property may avoid suit because it no longer possesses the property.

The Respondent’s motion was styled as a motion to dismiss for failure to state a claim or, in the alternative, a motion for summary judgment. In support of the motion, the Respondents submitted two affidavits by Selby, stating that the City no longer had possession of the property and indicating the likely whereabouts of the property. If a motion to dismiss includes evidence outside the pleadings, it will be treated as a motion for summary judgment. *See* TENN. R. CIV. P. 12.02. Although the trial court’s order did not specify whether it was granting a motion to dismiss or a motion for summary judgment, we presume that the trial court considered Selby’s affidavits. Therefore, on appeal, we treat the order as a grant of summary judgment. *See* TENN. R. CIV. P. 12.02.

We review a grant of summary judgment *de novo* with no presumption of correctness. *See Matthews Partners, LLC v. Lemme*, No. M2008-01036-COA-R3-CV, 2009 WL 3172134, at *3 (Tenn. Ct. App. Oct. 2, 2009) (citing *BellSouth Adver. & Publ'g Co. v. Johnson*, 100 S.W.3d 202, 205 (Tenn. 2003)). Upon review, we “must make a fresh determination that the requirements of Tenn. R. Civ. P. 56 have been satisfied.” *Id.* (citing *Hunter v. Brown*, 955 S.W.2d 49, 50-51 (Tenn. 1977)). Summary judgment is properly granted when “there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.” TENN. R. CIV. P. 56.04.

ANALYSIS

McWhorter’s petition was filed pursuant to Tennessee Code Annotated section 39-11-709(b), which authorizes a property owner to seek the return of property that has been seized for forfeiture. The statute states:

If after thirty (30) days from the date of the seizure of the property . . . no administrative or civil forfeiture action has been initiated, the owner . . . may petition the chancery court in the judicial district where the seizure occurred for return of the property seized. . . .

T.C.A. § 39-11-709(b) (2006). The statute specifies that the seized property is “deemed to be in the custody of the seizing agency or official.” T.C.A. § 39-11-709(a) (2006). Consistent with the statute, McWhorter’s petition asserts that he is the owner of the seized property, that Selby and the Sparta Police Department seized the property, and that no forfeiture proceeding had been initiated. As specified in the statute, McWhorter’s petition was filed in the Chancery Court of White County, Tennessee, the county in which the property was seized.

The Respondents note that Selby’s affidavit states that McWhorter’s property is no longer in the hands of the Sparta Police Department and indicates that the property is now in the possession of authorities in Nashville. The Respondents claim that, consequently, McWhorter ought to file his petition in Nashville. For reasons that are not apparent, in support of this assertion, the Respondents cite Tennessee Code Annotated § 39-11-705(c), which permits “a proceeding for forfeiture” to be “maintained in the judicial district in which any part of the property is found.” T.C.A. § 39-11-705(c) (2006). However, section 39-11-705 addresses jurisdiction and venue in *civil forfeiture proceedings*, and does not govern a petition for the return of seized property. *Compare* T.C.A. § 39-11-705 (2006) *with* T.C.A. § 39-11-709 (2006). *See Jones v. Greene*, 946 S.W.2d 817, 820-22 (Tenn. Ct. App. 1996) (discussing distinction between seized property and forfeiture in the context of Tennessee drug forfeiture statutes). “Seizure” is “[t]he act or instance of taking *possession* of . . . property by legal right.” BLACK’S LAW DICTIONARY 1363 (7th ed. 1999) (emphasis added). In this case, for example, McWhorter’s property was apparently seized in the course of a criminal investigation. In contrast, “civil forfeiture” is “[a]n in rem proceeding brought by the government against property.” BLACK’S LAW DICTIONARY 661 (7th Ed. 1999). Property is most often forfeited “to supplement criminal prosecution in deterring drug dealers and drunken drivers,” and revenue derived from the disposition of forfeited property is often retained by the seizing agency to fund its

law enforcement efforts. Patricia S. Wall & Lee Sarver, *Asset Forfeiture in Practice: Legislative Reform and Financial Considerations*, 37 TENN. B. J. 24, 25 (Apr. 2001). The record contains no indication that forfeiture proceedings have been initiated. Thus, section 39-11-705(c) has no relevance to McWhorter's petition.

In their cursory brief, the Respondents also assert that McWhorter should file his petition against the Nashville authorities whom Selby claims in his affidavits now have possession of McWhorter's property. They cite no authority whatsoever in support of this assertion. Section 39-11-709(a) specifies that seized property is "deemed to be in the custody of the seizing agency or official." T.C.A. § 39-11-709(a) (2006). This is consistent with Tennessee Code Annotated section 39-11-707(b), which provides that, when property is seized, "the seizing agency or official shall cause to be delivered a written receipt and notice of seizure to the . . . owner. . . . The notice shall list . . . the agency or official responsible for the seizure. . . ." T.C.A. § 39-11-707(b) (2006). The statutes obviously contemplate that a petition for return of property will be filed against the party that seized the property; the property owner has no ability to determine the whereabouts of his property without benefit of the legal processes afforded him through the court.

Here, McWhorter was given a notice of seizure stating that the property was seized by Selby and the City of Sparta Police Department. McWhorter then named as Respondents Selby and the City of Sparta Police Department, consistent with the statute. If the Respondents are no longer in possession of the property, they can take whatever action they deem advisable, including impleading the party to whom possession was transferred or the party currently in possession of the property. Regardless, the Respondents are statutorily "deemed" to have custody of the seized property, and they are not entitled to dismissal merely upon the assertion that they are no longer in possession of it. Therefore, we must conclude that the trial court erred in dismissing McWhorter's petition.

The decision of the trial court is reversed and the case is remanded for proceedings consistent with this opinion. The costs of this appeal are taxed to the Appellees Allen Selby and the City of Sparta, for which execution may issue if necessary.

HOLLY M. KIRBY, JUDGE